BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
CHARLES J. CORRELL)

Appearances:

For Appellant: Herschel B. Green, Attorney at Law.

For Respondent: W. M. Walsh, Assistant Franchise Tax Commissioner; Harrison Harkins, Associate Tax Counsel.

O P I N I O N

This anneal is made pursuant to Section 19 of the Personal Income Tax Act (Chapter 329, Statutes of 1935, as amended) from the action of the Franchise Tax Commissioner in overruling the protest of Charles J. Correll to a proposed assessment of additional tax in the amount of $795.37 for the year ended December 31, 1936.

During the year 1936 the Appellant was domiciled in the State of Illinois, but spent twenty-eight weeks in this State. During that time he was engaged in his profession as a radio entertainer, carrying on the program of Amos and Andy in collaboration with Freeman F. Gosden. An appeal by Mr. Gosden, involving issues identical to those presented herein, is also pending.

The proposed assessment, insofar as it is contested, resulted from the action of the Commissioner in disallowing a deduction claimed by the Appellant as salary paid to his wife, Mrs. Marie J. Correll, and a portion of the deduction claimed for traveling expenses. The amount disallowed as traveling expenses is alleged by the Commissioner to consist in part of personal expenses of the Appellant, and in part of traveling expenses of Mrs. Correll, who it is contended was not a bona fide employee of the Appellant,

The Appellant contends that he employed Mrs. Correll at, an annual salary of $25,000 to assist him in the preparation of material for the radio program. In his return for the year I-936 he claimed that 28/52 of $25,000, or $13,461.54, was attributable to his activities during the 28 weeks spent in California and therefor constituted a proper deduction under Section 8(a) of the Act as an "ordinary and necessary" expense of carrying on his

business.

The Commissioner contends that the salary deduction was properly disallowed on two separate and independent grounds: first, that by the law of Illinois, the State of domicile, the payments in question did not become the property of Mrs. Correll; and second, that it has not been shown that the payments were purely for services, or if so, that they were reasonable compensation for services rendered. It is our opinion that the first of these propositions is decisive of this issue and requires the conclusion that the deduction was properly disallowed.

The decisions of the United States Supreme Court have in general adhered to the view that under the Federal income tax statutes liability for the tax attaches to the person who owns the income. United States v. Robbins, 269 U. S. 315; Poe v. Seaborn, 282 U. S. 101; United States v. Malcolm, 282 U. S. 792; Cooley v. Commissioner, 75 Fed. 2d. 188, cert. den. 295 U. S. 747; Appeal of Neils Schultz 44 B. T. A. 146, 152; Cf. Blair v. Commissioner, 300 U. S. 5. Since Section 5 of the Personal Income Tax Act is essentially similar in wording to the statutory provisions involved in these authorities, we believe that they are conclusive in the determination of the question presented here. See Innes v. McColgan, 47 Cal. App. 2d. 741; Meanley v. McColgan 49 A. C. A. 251.

The rule making liability for the tax dependent upon the ownership of the income has been qualified to the extent that a person who has assigned or given away the right to receive income has been held taxable on that income on the ground that he realizes the economic benefit thereof just as completely as though he had himself collected it and then given it away. See Helvering v. Horst, 311 U. S. 112, and cases therein cited; Helvering v. Eubank, 311 U. S, 122; Harrison v. Schaffner, 312 U. S. 579. This qualification, however, does not render the general rule inapplicable to the situation presented here. It is important, therefore, to determine the respective rights of Mr. and Mrs. Correll in the amounts turned over to Mrs. Correll as salary.

Although apparently there is no complete unanimity on the point, the great weight of authority supports the view that the respective rights of husband and wife in personal property acquired during marriage are governed by the law of their domicile at the time of acquisition, even though the property was acquired or represented earnings derived elsewhere Jones v. The Aetna Insurance Co., 14 Conn. 501; Hill v. Townsend, 24 Tex. 575; Snyder v. Stringer, 116 Wash. 131, 198 Pac. 733. See Lefler, Community Property and Conflict of Laws, 21 Calif. L. Rev. 221 230-233. The Appellant and his wife having been domiciled in Illinois during the year 1936, the proper determination of the issue thus depends on the law of that State.

Chapter 68 of the Illinois Revised Statutes, Section 7 and

8, provides as follows:

> "Sec. 7. A married woman may receive, use and possess her own earnings, and sue for the same in her own name, free from the interference of her husband or his creditors.
>
> "Sec. 8. Neither husband or wife shall be entitled to recover any compensation for any labor performed or services rendered for the other, whether in the management of property or otherwise."

Although as a result of these provisions the common law rule that the earnings of the wife belong absolutely to the husband is no longer in force in Illinois, it has been expressly recognized that the old rule still applies with respect to earnings of the wife derived from services performed for her husband. Hazelbaker v. Goodfellow, 64 Ill. 235; Martin v. Robson, 65 Ill. 129. Such earnings are the property of the husband and are subject to the claims of his creditors. Cunningham v. Hanney, 12 Ill. App. 437. We believe accordingly that the Commissioner acted properly in computing the Appellant's net income without deduction for the salary paid Mrs. Correll.

This leaves for determination the amount of the deduction to be allowed on account of the traveling expenses of the Appellant and his wife, Although the manner in which we have disposed of the salary deduction issue has made it unnecessary to determine the monetary value of the services performed, it is our opinion that the evidence presented at the hearing established that Mrs. Correll and Mrs. Gosden were of assistance to their husbands in the preparation of the material for the radio program. We believe, accordingly, that their traveling expenses, to the extent that they are reasonable in amount, constitute proper deductions under the provisions of Section 8(a) of the Personal Income Tax Act . Pursuant to the suggestion of the Commissioner and the Appellant, however, final action with respect to the amount allowable as a deduction on account of the traveling expenses of the Appellant and Mrs. Correll will be held in abeyance in order to give the parties an opportunity to stipulate as to such amount.

O R D E R

Pursuant to the views expressed in the opinion of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the action of Charles J. McColgan, Franchise Tax Commissioner, in overruling the protest of Charles J. Correll to a proposed assessment of additional tax in the amount of $795.37 for the year ended December 31, 1936, be and the same is hereby sustained except insofar

as it pertains to the deduction claimed by the Appellant on account of traveling expenses. As respects this item the entry of a final order will be held in abeyance for a period of thirty days to afford an opportunity for the filing by the Appellant and the Commissioner of a stipulation with respect thereto.

Done at Sacramento, California, this 16th day of December, 1942, by the State Board of Equalization.

R. E. Collins, Chairman
George R. Reilly, Member
Harry B. Riley, Member

ATTEST: Dixwell L. Pierce, Secretary